ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 24, 2004

Mr. Steve Aragón
General Counsel
Texas Health and Human Services Commission
P.O. Box 13247
Austin, Texas 78711

OR2004-4209

Dear Mr. Aragón:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 202172.

The Texas Health and Human Services Commission (the "commission") received two requests for information provided to the commission relating to the development of the preferred drug list for the Texas Medicaid program. You indicate that the commission takes no position regarding the release of clinical monographs concerning classes of drugs under consideration for inclusion on the preferred drug list. However, you contend that release of the clinical monographs may implicate the proprietary interests of the third party, Provider Synergies, L.L.C. ("Provider Synergies"), that supplied the information to the commission. You contend that information provided to the commission by pharmaceutical manufacturers regarding offers to provide a program benefit in lieu of supplemental rebates are excepted under section 552.101 of the Government Code. In the alternative, you contend that release of this information may implicate the proprietary interests of the third party manufacturers. You state, and provide documentation showing, that you notified Provider Synergies and the pharmaceutical manufacturers at issue of the requests and of their rights to submit arguments to this office as to why the information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Public Information Act in certain circumstances). We have reviewed the submitted information. We have also considered comments submitted by the requestor and by the Texas Medical Association. *See*

Gov't Code § 552.304 (providing that member of public may submit comments stating why information should or should not be released).

As a threshold matter, we note that the request submitted by Ms. Susan Gusky also asks for contracts between the commission and two third parties relating to preferred drug list/supplemental rebate services and prior authorization services. These contracts are the subject of a prior ruling of this office, issued as Open Records Letter No. 2004-1538A (2004) on April 2, 2004. Based on the information provided, we understand you to represent that the relevant facts and circumstances have not changed since the issuance of Open Records Letter No. 2004-1538A. Thus, with respect to the contract information at issue in Ms. Gusky's request, we determine that the commission must continue to follow Open Records Letter No. 2004-1538A. *See* Open Records Decision No. 673 (2001) (governmental body may rely on previous determination when 1) the records or information at issue are precisely the same records or information that were previously submitted to this office pursuant to section 552.301(e)(1)(D); 2) the governmental body which received the request for the records or information is the same governmental body that previously requested and received a ruling from the attorney general; 3) the prior ruling concluded that the precise records or information are or are not excepted from disclosure under the Public Information Act; and 4) the law, facts, and circumstances on which the prior ruling was based have not changed since the issuance of the ruling). The present ruling addresses the public availability of the remaining information requested by Ms. Gusky.

As a second threshold matter, we note that Provider Synergies argues that the request submitted by Ms. Kim Suiter is not a valid request for public information under the Public Information Act (the "Act"), because the requestor asks that the information at issue "be made public via the [commission's] website." We note that a request for information that is reasonably identifiable as a request for public records is sufficient under the Act. *See* Open Records Decision Nos. 497 (1988), 44 (1974). In this case, the commission considers Ms. Suiter's request to be a valid request under the Act and has responded appropriately. Accordingly, we find Ms. Suiter's request to be a legitimate request for public information under the Act.

We now turn to the information at issue in the present requests. The commission contends that program benefit proposal information provided to the commission is excepted from disclosure under section 552.101 of the Government Code. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," and encompasses information made confidential by other statutes. The Seventy-eighth Legislature added section 531.071 of the Government Code, which provides:

> (a) Notwithstanding any other state law, information obtained or maintained by the commission regarding prescription drug rebate negotiations or a supplemental medical assistance or other rebate

> agreement, including trade secrets, rebate amount, rebate percentage, and manufacturer or labeler pricing, is confidential and not subject to disclosure under [the Act.]
>
> (b) Information that is confidential under Subsection (a) includes information described by Subsection (a) that is obtained or maintained by the commission in connection with the Medicaid vendor drug program, the child health plan program, the kidney health care program, the children with special health care needs program, or another state program administered by the commission or a health and human services agency.
>
> (c) General information about the aggregate costs of different classes of drugs is not confidential under Subsection (a).

Gov't Code § 531.071. The commission advises that newly-enacted sections 531.070 through 531.074 of the Government Code establish a preferred drug list for the Texas Medicaid program and other medical assistance programs administered by the commission and the health and human services agencies. The commission further states that the program benefit information at issue consists of "information obtained or maintained by the commission regarding prescription drug rebate negotiations or a supplemental medical assistance or other rebate agreement." Based on the commission's representations and our review, we find that the program benefit proposal information submitted for review as Exhibit C is confidential pursuant to section 531.071(a) of the Government Code and must be withheld under section 552.101 of the Government Code.[1]

We next address the requested clinical monographs of classes of drugs under consideration for inclusion in the Medicaid program preferred drug list, which you have submitted for review as Exhibit B. As noted, the commission does not contend that this information is excepted from public disclosure. We understand Provider Synergies to represent that the clinical monographs must be withheld from disclosure by the commission pursuant to nondisclosure agreements between Provider Synergies and the commission. We emphasize that information is not confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) ("[T]he obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a contract."); 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements

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[1] Based on this finding, we need not reach arguments submitted by Bristol-Myers Squibb Company, Eli Lilly and Company, Janssen Pharmaceutica, Inc., and Pfizer Health Solutions regarding this information.

of statutory predecessor to section 552.110). Consequently, unless the information at issue falls within an exception to disclosure, it must be released, notwithstanding any agreement specifying otherwise.

Provider Synergies also contends that the clinical monographs are excepted under sections 552.101 and 552.110 of the Government Code. Provider Synergies contends that the clinical monographs at issue constitute records of medical committee that are confidential under section 161.032 of the Health and Safety Code. Section 161.032 provides in pertinent part:

> (a) The records and proceedings of a medical committee are confidential and are not subject to court subpoena.
>
> . . . .
>
> (c) Records, information, or reports of a medical committee . . . and records, information, or reports provided by a medical committee . . . to the governing body of a public hospital . . . are not subject to disclosure under Chapter 552, Government Code[.]

Health & Safety Code § 161.032. Subchapter D of chapter 161 of the Health and Safety Code relates to medical committees of health care organizations, medical peer review committees, and compliance officers, established or appointed for evaluation of medical and health care services. *See* Health & Safety Code § 161.0315 (governing body of health care organization may form medical committee to evaluate medical and health care services).

Section 161.031(a) of the Health and Safety Code defines a "medical committee" as "any committee . . . of: (1) a hospital; (2) a medical organization; (3) a university medical school or health science center; (4) a health maintenance organization[;] (5) an extended care facility; (6) a hospital district; or (7) a hospital authority." Provider Synergies contends that the Pharmaceutical and Therapeutics Committee of the commission, established pursuant to section 531.074 of the Government Code, is a "medical committee" as contemplated in section 161.032 of the Health and Safety Code. The Pharmaceutical and Therapeutics Committee is an advisory committee of physicians and pharmacists appointed by the governor, as provided under section 531.074 of the Government Code, for the purposes of developing recommendations for preferred drug lists adopted by the commission. *See* Gov't Code § 531.074; *see also id.* § 531.072 (commission shall adopt preferred drug list for the Medicaid vendor drug program). The commission does not contend that the Pharmaceutical and Therapeutics Committee is a "medical committee" as contemplated in section 161.032. We note that the Pharmaceutical and Therapeutics Committee of the commission is not one of the enumerated types of entities defined as a "medical committee" for purposes of chapter 161 of the Health and Safety Code, and was established pursuant to legislative mandate under section 531.074 of the Government Code, rather than under the public health

provisions of chapter 161. *See* Gov't Code § 531.074, Health & Safety Code § 161.031(a). We further note that the Pharmaceutical and Therapeutics Committee of the commission was established for the purpose of developing a preferred drug list for the Medicaid vendor drug program and was not established for the purpose of evaluating medical and health care services. Accordingly, we determine that section 161.032 of the Health and Safety Code is not applicable to the clinical monographs at issue. We therefore determine that the clinical monographs may not be withheld under section 552.101 on that basis.

Provider Synergies also contends that the clinical monographs are excepted from disclosure as trade secrets under section 552.110(a) of the Government Code. Section 552.110 protects commercial or financial information, the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained, and trade secrets. *See* Gov't Code § 552.110(a), (b). Section 552.110(a) protects the property interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See* Gov't Code § 552.110(a). A "trade secret"

> may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business in that it is not simply information as to single or ephemeral events in the conduct of the business, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees. . . . A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

There are six factors to be assessed in determining whether information qualifies as a trade secret:

> (1) the extent to which the information is known outside of [the company's] business;

> (2) the extent to which it is known by employees and others involved in [the company's] business;
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> (3) the extent of measures taken by [the company] to guard the secrecy of the information;
>
> (4) the value of the information to [the company] and to [its] competitors;
>
> (5) the amount of effort or money expended by [the company] in developing this information; and
>
> (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision No. 232 (1979). This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990). However, we cannot conclude that section 552.110(a) is applicable unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. Open Records Decision No. 402 (1983).

Provider Synergies indicates, and the documents reflect, that the clinical monographs at issue consist of compilations of information regarding the current state of certain therapeutic classes of drugs. Provider Synergies indicates that pharmacists employed by Provider Synergies compile the information in the monographs from scientific studies of the drugs at issue that are published in peer-reviewed medical journals. Thus, Provider Synergies indicates that the monographs are compiled from clinical information that is generally available to the public. Further, we note that the monographs contain only medical and scientific information regarding the efficacy and safety of classes of therapeutic drugs, and do not contain any information describing the development, manufacturing, or pricing of particular commercial drug products. Upon review of the submitted information and the arguments submitted by Provider Synergies, we find that Provider Synergies has failed to establish that the clinical monographs at issue meet the definition of a trade secret, and has failed to demonstrate the necessary factors to establish a trade secret claim for the information. We therefore determine that the commission may not withhold the clinical monographs at issue pursuant to section 552.110(a) of the Government Code.

Provider Synergies also contends that the clinical monographs at issue are excepted under section 552.110(b) of the Government Code. We find that Provider Synergies has failed to establish that the information at issue is excepted under section 552.110(b). *See* Open Records Decision Nos. 661 (1999) (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual

evidence that substantial competitive injury would result from release of particular information at issue), 541 (1990). We therefore determine that the commission may not withhold the clinical monographs at issue pursuant to section 552.110(b) of the Government Code.

We note that the clinical monographs at issue may be protected by copyright. A a custodian of public records must comply with copyright law and is not required to furnish copies of records that are protected by copyright. Attorney General Opinion JM-672 (1987). However, copyright protection does not make information confidential for purposes of the Act; a governmental body must allow inspection of copyrighted materials unless an exception to disclosure applies to the information. *Id.* If a member of the public wishes to make copies of materials protected by copyright, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

In summary, the program benefit proposal information, which you have submitted as Exhibit C, is confidential by law pursuant to section 531.071(a) of the Government Code and must be withheld under section 552.101 of the Government Code. The requested clinical monographs, which you have submitted as Exhibit B, must be released to the requestor. To the extent the clinical monographs are protected by copyright, they must be released in compliance with copyright law.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records

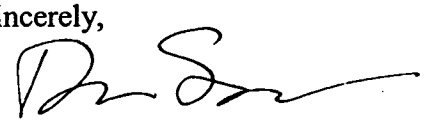
will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



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DRS/seg

Ref: ID# 202172

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